



Comptroller General
of the United States

Washington, D.C. 20548

Mr. Mitchell

Decision

Matter of: Rainier Welding, Inc.

File: B-245849

Date: December 11, 1991

Richard F. Forster for the protester.
Jan Gilhousen for COFAB, Inc., an interested party.
Allen W. Smith, Department of Agriculture, for the agency.
John F. Mitchell, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

1. Protest of solicitation specifications as defective is dismissed as untimely where not filed with the General Accounting Office until 2 weeks after bid opening.
2. Consultant's pre-bid opening telephone conversations with contracting agency's employees cannot be considered a timely agency-level protest by the bidder now protesting to the General Accounting Office where: (1) the protester has not shown that the consultant was acting on the protester's behalf; and (2) the communications were oral.

DECISION

Rainier Welding, Inc. protests the specifications contained in invitation for bids (IFB) No. R6-3-91-77S, issued by the Forest Service, Department of Agriculture, for the supply of three prefabricated bridge structures. Rainier claims that the IFB's specifications were defective, as a result of which all bidders may not have bid on the same basis.

We dismiss the protest as untimely.

The IFB was issued on August 2, 1991, and, as amended, set the bid opening for September 11. The solicitation was for the fabrication of three modular portable bridge superstructures and their delivery to the Gifford Pinchot National Forest. Bidders were advised that these timber-and-steel structures were to have standard rolled steel girders as their main load-bearing members. The solicitation instructed bidders to generally follow the design and fabrication criteria contained in the American Association of State Highway and Transportation Officials' (AASHTO) Standard Specifications for Highway Bridges. More

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particularly, with respect to the loads for which the structures were to be designed, the specifications stated the "minimum" design load should conform to AASHTO's published standards. In addition, each structure was to be designed to accommodate certain logging equipment within certain guidelines, which included a formula for designing the steel members by the load factor design concept. The formula included numerical values but contained typographical errors, such as the omission of the Greek letter for "gamma." The agency concedes the formula was typed incorrectly but maintains that the nature of the error would be obvious to experienced bridge fabricators, who could arrive at the correct load design by using the numerical values given in the formula in conjunction with the remainder of the IFB specifications and the AASHTO publication.

Between the issuance of the IFB and bid opening, the Forest Service received only one inquiry about the formula, and that was from a consultant upon whose advice Rainier has relied in filing its protest. The consultant's memorandum of a telephone conversation with a Forest Service employee reflects the consultant's understanding that the Forest Service's requirements could be satisfied by the use of heavy (and thus expensive) girders, that the IFB would not be amended and that bid opening would occur as scheduled. The protester's bid was the third-highest of the five bids received. Award was made to the low bidder, COFAB, Inc., on September 17.

In its protest filed with our Office on September 25, 2 weeks after bid opening, Rainier argued that the error in the specification formula should have been corrected through an amendment in order to assure that all bidders were bidding on the basis of using heavier girders than in the past.

Rainier's protest is based upon an alleged impropriety in the solicitation which was apparent prior to bid opening. Our Bid Protest Regulations require such protests to be filed prior to bid opening in order to be timely. 4 C.F.R. § 21.2(a)(1) (1991), as amended by 56 Fed. Reg. 3759 (1991). Our Regulations include a timeliness requirement for protests based on alleged solicitation improprieties to serve an important purpose--to enable the contracting agency or our Office to decide an issue while it is most practicable to take corrective action where the circumstances warrant. GM Plastics, Inc., B-235083, Apr. 24, 1989, 89-1 CPD ¶ 405. Here, that time would have been before bids were publicly opened and the competitors' identities and prices revealed.

The consultant's informal discussions with agency personnel cannot be considered a timely, pre-bid opening agency-level protest by Rainier for several reasons. First, Rainier has not shown that in making his inquiry, the consultant was acting on Rainier's behalf or as Rainier's authorized representative. We have no basis, therefore, to consider the consultant's actions to be those of Rainier. Second, even if the consultant were acting as Rainier's representative, his actions do not meet at least two of the criteria which are required for a "protest"--which the contracting agency must consider and resolve--in contrast to an informal inquiry, in that the consultant's contacts were not in writing and were not in the form of an objection coupled with a request for corrective action. See Federal Acquisition Regulation § 33.101; Constantine N. Polites & Co.--Recon., B-233935.2, Feb. 17, 1989, 89-1 CPD ¶ 173.

Finally, we note that Rainier also alleges that it would have been the second-low bidder, and not third low, but for the contracting officer's erroneous oral advice that Washington state sales tax applied to this procurement. Rainier would not be in line for the award of this contract even if it were considered to be the second-low bidder, in the absence of a timely challenge of the award to the low bidder, COFAB. Since this issue has no practical consequence with regard to this procurement, it is academic and will not be considered by our Office.

The protest is dismissed.



John Brosnan
Assistant General Counsel